

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0006
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES DANIEL FLORES,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100683

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and David A. Sullivan

Tucson
Attorneys for Appellee

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant James Flores was convicted of possession of a dangerous drug for sale and possession of drug paraphernalia. On appeal, Flores argues the state improperly influenced a defense witness's decision to testify. He also claims that insufficient evidence supported his conviction for possession of drug paraphernalia and the trial court erred in denying his motion for a judgment of acquittal. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In August 2011, Officer Thiess observed a car driving erratically through an alleyway in Huachuca City. Thiess followed the car and, after the car stopped on its own, made contact with Flores. After running a status check on Flores's identification and discovering "issues," Thiess placed Flores under arrest. He then requested a border patrol agent to conduct a canine sniff of the vehicle. The canine alerted to the presence of drugs and Thiess searched the car, removing a purse from the vehicle. Inside the purse he found a mirror with methamphetamine residue on it and a purple Crown Royal bag containing a smoking device, a digital scale, and a plastic bag with methamphetamine. Flores admitted that the Crown Royal bag was his and that he had placed it inside the purse.

¶3 Flores was charged with and convicted of possession of a dangerous drug for sale and possession of drug paraphernalia. He was sentenced to concurrent prison

terms, the longest of which was ten years. Flores appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Witness Coercion

¶4 Flores first argues the state impermissibly interfered with a defense witness's decision to testify, thereby violating Flores's due process rights. He did not raise this argument below; instead Flores decided not to call the witness, specifically declining to state the reasons for his decision. Flores has therefore forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). In his opening brief, however, Flores does not argue that the error is fundamental or prejudicial. He attempted to cure this deficiency in his reply brief, but we will not consider arguments first raised in a reply brief. *See State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985). Because he did not adequately argue this issue on appeal, and because we find no error that can be characterized as fundamental, the argument is waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue alleged error fundamental waives issue on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Sufficiency of the Evidence

¶5 Flores next argues the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., because insufficient evidence

supported his conviction for possession of drug paraphernalia. He claims the state did not adduce any evidence connecting him to the mirror as charged in the indictment. Whether the evidence presented at trial was sufficient to support a defendant's conviction is a legal question we review de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990), *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶6 Section 13-105(34), A.R.S., defines “[p]ossess” as “knowingly to have physical possession or otherwise to exercise dominion or control over property.” In interpreting the statute, we have said that “[o]ne who exercises dominion or control over property has constructive possession of it even if it is not in his physical possession.” *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998). Additionally, “[p]ossession may be actual or constructive.” *State v. Gonsalves*, 231 Ariz. 521, ¶ 9, 297 P.3d 927, 929 (App. 2013). The state may prove constructive possession through direct or circumstantial evidence, so long as the evidence shows by “specific facts or circumstances that the defendant exercised dominion or control” over the object. *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987).

¶7 Flores admitted to exercising control over the purse the mirror was found in when he stated to Thiess that he had placed his Crown Royal bag inside the purse, and the mirror was paraphernalia for use with the drugs he admitted were his. Although not

direct evidence of control over the mirror itself, the jury could easily have inferred that Flores had control over all the purse's contents. Thus, although Flores was not in actual physical possession of the mirror, sufficient evidence supported a finding that he had constructively possessed it. Under these circumstances, we cannot say the trial court erred in denying Flores's motion for judgment of acquittal. *See Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056.

Conclusion

¶8 For the foregoing reasons, we affirm Flores's convictions and sentences.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge